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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JESSICA E. LEMAY, KATHRYN G. BENNETT,
KEITH EDGETT, DANE R. JACKSON and JAMSHID REJAI

Appeal 2010-004810
Application 10/601,771
Technology Center 3700

Before JENNIFER D. BAHR, JOHN C. KERINS and
MICHAEL L. HOELTER, *Administrative Patent Judges.*

HOELTER, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

This is a decision on appeal, under 35 U.S.C. § 134(a), from a final rejection of claims 1-6 and 8-73 (App. Br. 2). Claim 7 has been cancelled (App. Br. 16). We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

THE CLAIMED SUBJECT MATTER

The claimed subject matter pertains to a barrel of a tampon applicator, the barrel having a tapered insertion tip having a taper ratio greater than 1 to about 8. Independent claim 1 is illustrative of the claims on appeal and is reproduced below:

> 1.   A tampon applicator comprising a barrel, said barrel having a tapered insertion tip with a plurality of petals, wherein the insertion tip has a taper ratio greater than 1 to about 8,
>   wherein the taper ratio is a length of a projection of the insertion tip taper along a longitudinal axis of the barrel to a length of a projection of the insertion tip taper along a radius of the barrel at a base region of the plurality of petals, and
>   wherein said plurality of petals each have a thickness of about 0.004 inches to about 0.022 inches, and wherein said plurality of petals have a substantially uniform thickness.

REFERENCES RELIED ON BY THE EXAMINER

Werner	US 3,765,416	Oct. 16, 1973
Berger	US 3,895,634	Jul. 22, 1975
Suga	US 2001/0056253 A1	Dec. 27, 2001

"Taper" Oxford online dictionary, Feb. 2007

THE REJECTIONS ON APPEAL

1.   Claims 1-6, 8-10, 13-22, 32-61, 63, 64 and 66-73 are rejected under 35 U.S.C. § 103(a) as being obvious over Suga and Berger (Ans. 3).

2.   Claims 11, 12, 23-31, 62 and 65 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Suga, Berger and Werner (Ans. 6).

ANALYSIS

The Rejection of Claims 1-6, 8-10, 13-22, 32-61, 63, 64 and 66-73
as being obvious over Suga and Berger

Each independent claim (i.e., claims 1, 37 and 72) requires a barrel applicator having a taper ratio[1] at its insertion tip. The Examiner finds that Suga discloses an applicator barrel having the claimed taper ratio (Ans. 3). The Examiner further relies on Berger for disclosing the claimed thickness range but Appellants do not dispute these teachings of Berger (Ans. 3; App. Br. 10-11, Reply Br. 5). The Examiner concludes that one would be motivated to modify Suga with the thickness stated in Berger "to provide an easily-inserted apparatus" (Ans. 3-4).

Appellants argue independent claims 1 and 37 together and repeat these arguments with respect to claim 72 (App. Br. 6, 11). Appellants

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[1] Independent claims 1 and 37 are similar in that they each define the taper ratio as a length of a projection of the insertion tip taper along a longitudinal axis of the barrel to a length of a projection of the insertion tip taper along a radius of the barrel at a base region of the insertion tip. Independent claim 72 defines the taper ratio as a ratio of the largest radius of the tapered barrel to a radius of the tapered barrel at a base region of the insertion tip. Independent claims 1 and 37 require the taper ratio to be "greater than 1 to about 8" while independent claim 72 requires a taper ratio "of about 1.2 to about 8." Appellants disclose tapered insertion tip 24 having a base region radius CD (Spec. 5:15 to 6:5 and Fig. 2, *see also* 7:15 and Fig. 4). See also base region 48 (Fig. 5-6).

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contend that Suga does not disclose the claimed taper ratio and more specifically, that "Suga does not disclose or suggest any tapered[2] applicator" (App. Br. 8). Appellants also address the Examiner's annotated Figure 2 of Suga (*see* Ans. 9) stating that there is no support in Suga for such an annotation and that the Examiner relied on impermissible hindsight reconstruction for this annotation (App. Br. 8, *see also* Reply Br. 4).

To show that Suga discloses the claimed taper ratio, the Examiner "maintains that tampon length A is equivalent to [the] length of projection of the insertion" (Ans. 9, *see also* Suga Fig. 2). We are not persuaded that Suga's length A is equivalent as found by the Examiner because Suga teaches that dimension A is the full length of the *enclosed tampon* (Suga ¶ [0011] and Fig. 2) while the claims are directed to the longitudinal axis BD of the tapered insertion tip of the *barrel* (*see* App. Br. 9 and Fig. 2, *see also* Reply Br. 4, 5). The Examiner also finds that the barrel's "taper projection length" equals the "tapered tampon length A" which equals 20-60 mm (Ans. 3). We are not apprised of the rationale by which the Examiner equates the barrel's "taper projection length" with "tapered tampon length A" (Ans. 3). We also are not certain how the Examiner arrived at the finding that tampon length A equals 20-60 mm (Ans. 3; App. Br. 9). Suga's Paragraph 11 provides numerical ranges for the dimensions of A and L in Figure 2, as well as grip region 22 "plus 40-60 mm" but the Examiner does not provide analysis as to how these ranges lead to the finding that length A equals 20-60 mm (Ans. 3).

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[2]Appellants and the Examiner agree on the meaning of "tapered" (*see* Spec. 2:16 "tapered, or non-hemispherical" and Ans. 8 "the applicator can be tapered *or* non-hemispherical").

In the alternative, the Examiner proffers an "Alternative projection length" (*see* Examiner's annotated Fig. 2 at Ans. 9) stating that this alternative length could be employed to satisfy Appellants' claimed taper ratio of "greater than 1" (or "about 1.2" for claim 72). Appellants contend that if this "alternative projection length" were used, the resulting ratio "would be much less than one" because the Examiner's alternative length would be less than the claimed radius, not more (Reply Br. 5). The Examiner does not clarify how comparing this apparently smaller dimension (i.e., smaller than Suga's dimension A) with the barrel's radius would result in a taper ratio within the claimed range.

Furthermore, Suga is silent regarding the relative dimensions of the insertion tip and we decline to scale drawings when there is no indication that they are drawn to precise proportions. Accordingly, and based on the record presented, we are not persuaded that the grounds for rejection can be sustained due to a lack of articulated reasoning with rational underpinning. We reverse the rejection of claims 1-6, 8-10, 13-22, 32-61, 63, 64 and 66-73.

*The Rejection of Dependent Claims 11, 12, 23-31, 62 and 65
as being unpatentable over Suga, Berger and Werner*

Each of these dependent claims depend directly or indirectly from either independent claim 1 or 37. We are not persuaded that the Examiner's additional reliance on Werner cures the deficiency noted above and accordingly, we reverse the rejection of claims 11, 12, 23-31, 62 and 65.

DECISION

The rejections of claims 1-6 and 8-73 are <u>reversed</u>.

<u>REVERSED</u>

MP